IN THE SUPREME COURT OF MISSOURI

REPRODUCTIVE HEALTH SERVICES OF PLANNED PARENTHOOD OF THE ST. LOUIS REGION, INC. et al., Appellants,

v.

JEREMIAH W. NIXON, Attorney General of Missouri, in his official capacity, et al., Respondents.

On Appeal from the Circuit Court of Boone County, Missouri

APPELLANTS' BRIEF

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JURISDICTIONAL STATEMENT

This action involves the question of whether (1) Section 188.039 of the Missouri Revised Statutes ("Act") is impermissibly vague, notwithstanding the existence of the scienter provisions at Sections 188.075 and 188.065 of the Missouri Revised Statutes, in violation of the due process clause of Article I, Section 10, of the Missouri Constitution; and (2) the Act's mandatory 24-hour waiting period violates the fundamental rights to liberty and privacy guaranteed by the Missouri Constitution. Accordingly, this appeal falls within the exclusive appellate jurisdiction of the Supreme Court of Missouri. Mo. Const. art. 5, § 3.

INTRODUCTION

Appellants Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc. and Comprehensive Health Services of Planned Parenthood of Kansas and Mid-Missouri, Inc. (collectively, "Planned Parenthood") originally filed an action challenging the Act in the United States District Court for the Western District of Missouri. The federal district court abstained, in order to obtain a definitive state court ruling as to how the scienter provisions at Sections 188.075 and 188.065 affect the obligations of the Act.

Following the abstention order, Planned Parenthood filed this action in the Circuit Court of Boone County. As requested by the federal court, Planned Parenthood sought an explanation of how the scienter provisions apply to, and impact Planned Parenthood's obligations under, the Act. In addition, Planned Parenthood sought a declaration that the Act is unconstitutional under the Missouri

Constitution. The trial court, in a twelve-line order, concluded that the Act does not violate the Missouri Constitution. The trial court gave no explanation of why that was so, and no explanation of how the scienter provisions apply to the Act.

This Court should reverse that decision and find the Act unconstitutional under the Missouri Constitution. If this Court should uphold the Act, Planned Parenthood urges that, for the benefit of the federal district court to which the parties will return after this Court rules, the Court provide a complete explanation of how the scienter provisions impact the obligations imposed by the Act.

STATEMENT OF FACTS

The Challenged Statute

In 2003, the Missouri General Assembly passed the Act, overriding the veto of Governor Robert Holden. The Act, which was scheduled to take effect on October 11, 2003, replaced Missouri's existing statutory informed consent requirements for physicians providing abortions. (*See* Legal File ("LF") at 12-14.)

The Act provides that no person may perform an abortion unless, at least 24 hours prior to the abortion, a physician has "conferred" with the patient and "discussed" with her "the indicators and contraindicators, and risk factors including any physical, psychological, or situational factors for the proposed procedure . . . in light of her medical history and medical condition." Mo. Rev. Stat. § 188.039.2.

During the conference, the patient must be "evaluated" by the physician for "indicators and contraindicators, risk factors including any physical,

psychological, or situational factors which would predispose the patient to or increase the risk of experiencing one or more adverse physical, emotional, or other health reactions to the proposed procedure or drug or drugs in either the short or long term as compared with women who do not possess such risk factors." *Id.* § 188.039.3.

Following the conference, if the patient chooses to proceed with the abortion, the physician "shall sign and shall cause the patient to sign a written statement that the woman gave her informed consent freely and without coercion after the physician had discussed with her the indicators and contraindicators, and risk factors, including any physical, psychological, or situational factors." *Id.* § 188.039.4. The Act directs the "department of health and senior services" to "disseminate a model form that physicians may use as the written statement" required by the Act and provides that "any lack or unavailability of such a model form shall not affect the duties of the physician" set forth in the Act. *Id.* § 188.039.5.

Any person who "knowingly fails to perform any action required by [the Act]," is guilty of a class A misdemeanor, *id.* § 188.075, punishable by imprisonment of up to one year, *id.* § 588.011(5), and fines of up to \$5000, *id.* § 560.021 and 560.016(1). Any practitioner who "shall willfully and knowing do or assist any action made unlawful by [the Act]" is also subject to having his or her professional license revoked. *Id.* § 188.065.

The Federal Litigation

On October 3, 2003, Planned Parenthood filed a lawsuit in federal court challenging the constitutionality of the Act. ¹ On October 10, 2003, the federal court entered a temporary restraining order enjoining enforcement of the Act. On May 6, 2004, the federal court abstained and continued the temporary restraining order. (LF at 16-18.) The temporary restraining order was vacated by the United States Court of Appeals for the Eighth Circuit on May 27, 2004. On June 22, 2004, the federal court issued a preliminary injunction against enforcement of the Act. (*Id.* at 23-28.) The Attorney General appealed the preliminary injunction order to the Eighth Circuit, but did not appeal the abstention order. That appeal has been argued, and a decision is pending.

In the federal action, Planned Parenthood claimed that the Act is unconstitutionally vague under the Fourteenth Amendment to the United States Constitution. The Attorney General argued that the scienter provisions at Sections 188.075 and 188.065 of the Missouri Revised Statutes cured any vagueness in the Act. The federal court abstained in order for Planned Parenthood to file a state court action to obtain a ruling on how the scienter provisions impact the obligations imposed by the Act. When the court abstained, it acknowledged that

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¹ The federal defendants are Missouri Attorney General Jeremiah W. Nixon, St. Louis Circuit Attorney Jennifer Joyce, and Boone County Prosecuting Attorney Kevin Crane (collectively, "Attorney General").

Planned Parenthood had reserved their federal constitutional claims for adjudication in federal court. (*Id.* at 16-18.)

This Litigation

On June 23, 2004, Planned Parenthood filed this action.² Planned Parenthood sought a declaration that (1) the Act is impermissibly vague, notwithstanding the existence of the scienter provisions, in violation of the Missouri Constitution; and (2) the Act's mandatory 24-hour waiting period violates the Missouri Constitution. Planned Parenthood also asked the court to explain how the scienter provisions apply to, and impact Planned Parenthood's obligations under, the Act should it conclude that the Act is constitutional and the scienter provisions resolve the Act's vagueness. On March 15, 2005, on crossmotions for summary judgment, the trial court issued its order sustaining the Attorney General's Motions for Summary Judgment and denying Planned Parenthood's Motion for Summary Judgment, without legal analysis and without explaining how the scienter provisions apply to the Act.

POINTS RELIED ON

I. The Trial Court Erred In Finding That "The Terms Of [The Act] Are
Not Impermissibly Vague" Because The Act's Language Is Incurably
Vague, Notwithstanding The Existence Of The Scienter Provisions At
Sections 188.075 And 188.065 Of The Missouri Revised Statutes, In
Violation Of The Due Process Clause Of Article I, Section 10 Of The

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² The defendants in this action are the same as in the federal action.

Missouri Constitution, In That It Imposes Boundless Obligations On Physicians

Mo. Rev. Stat. § 188.039

Mo. Rev. Stat. § 188.039 (repealed 2003)

Mo. Rev. Stat. § 188.075

Mo. Rev. Stat. § 188.065

Mo. Const. art. 1, § 10.

City of Festus v. Werner, 656 S.W.2d 286 (Mo. Ct. App. 1983)

State ex rel. Dir. of Revenue v. Gaertner, 32 S.W.3d 564 (Mo. 2000)

Smith v. Goguen, 415 U.S. 566 (1974)

Baggett v. Bullitt, 377 U.S. 360 (1964)

II. The Trial Court Erred In Finding That "The Twenty-Four Hour Waiting Period To Obtain An Abortion Does Not Violate The Missouri [Constitution]" Because The Act's Mandatory Waiting Period Is Unconstitutional Under The Missouri Constitution, In That The Guarantees Of Liberty And Privacy Under The Missouri Constitution Afford More Protection To The Right To Choose An Abortion Than The United States Constitution, And, Under Those Heightened Guarantees, The Waiting Period Must Be Struck Down³

³ The trial judge also found that the waiting period does not violate the United States Constitution. However, that question was not before the court; indeed,

Mo. Rev. Stat. § 188.039

Mo. Const. art. I, § 2

Mo. Const. art. I, § 10

Mo. Const. art. I, § 1

Mo. Const. art. I, § 3

Mo. Const. art. I, § 5

Mo. Const. art. I, § 8

Mo. Const. art. I, § 15

Mo. Const. art. I, § 24

Barber v. Time, Inc., 159 S.W.2d 291 (Mo. 1942)

Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.2d 1 (Tenn. 2000)

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ARGUMENT

The standard of review for a grant of summary judgment is "essentially *de novo*" because "[t]he propriety of summary judgment is purely an issue of law." *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. 1993) (en banc). "As the trial court's judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court's

Planned Parenthood neither claimed nor argued that the waiting period violates the federal constitution either in this action or in the federal action.

order granting summary judgment." *Id.* (citations omitted). An appellate court must "review the record in the light most favorable to the party against whom the judgment was entered" and accord the non-movant "the benefit of all reasonable inferences from the record." *Id.*

I. The Trial Court Erred In Finding That "The Terms Of [The Act] Are
Not Impermissibly Vague" Because The Act's Language Is Incurably
Vague, Notwithstanding The Existence Of The Scienter Provisions At
Sections 188.075 And 188.065 Of The Missouri Revised Statutes, In
Violation Of The Due Process Clause Of Article I, Section 10 Of The
Missouri Constitution, In That It Imposes Boundless Obligations On
Physicians

The due process clause of Article I, Section 10 of the Missouri Constitution requires that statutes clearly (1) give "notice to the ordinary person of what is prohibited" and (2) "provide law enforcement officials with standards so as to prevent arbitrary and discriminatory enforcement." *City of Festus v. Werner*, 656 S.W.2d 286, 287 (Mo. Ct. App. 1983) (citations omitted) (holding municipal ordinance "too vague to be enforceable or constitutional"). Those that fail to satisfy either of these tests are impermissibly vague. *See id*.

A vague law is especially problematic and the standard of a court's review is, therefore, more stringent, in the presence of certain factors. First, and "the most important factor affecting the clarity that the Constitution demands of a law," is "whether [the law] threatens to inhibit the exercise of constitutionally protected

rights." *State ex rel. Nixon v. Telco Directory Publ'g*, 863 S.W.2d 596, 600 (Mo. 1993) (en banc) (quotation marks and citation omitted). Where, as here, physicians who provide abortions cannot determine what conduct will incur liability and what conduct will not, women's constitutional rights are abridged. As the United States Supreme Court has long recognized, "uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)). Rather than risk imprisonment, fines, or losing his or her license, a physician may choose instead not to perform abortions, thereby burdening the constitutional right of women to choose an abortion.

Second, "[t]he possibility of criminal sanctions heightens the stakes and necessarily sharpens the focus of the constitutional analysis." *State v. Shaw*, 847 S.W.2d 768, 774 (Mo. 1993) (en banc). As described above, Section 188.075 of the Missouri Revised Statutes subjects physicians to criminal penalties—including imprisonment—for failing to comply with the Act. Because the Act both threatens a woman's constitutional right to choose an abortion and makes criminal sanctions possible, the need for clarity is at its height.

A. The Act Is Impermissibly Vague As A Matter Of Law Because It Is Boundless.

The Act is void for vagueness because it imposes boundless obligations on physicians. None of the Act's operative terms—including "indicators," "contraindicators," "risk factors," and "situational factors"—are defined or limited in any way. It is clear that the physician must "confer" with the patient, "evaluate" her, and then "discuss" with her. However, what is to be covered in the conference, evaluation, and discussion is potentially boundless. The district court in the federal action agreed:

The Act provides no definitions for its terms, including such vague and expansive terms as "situational factors," "indicators," and "contraindicators." In addition, the Act does not place any boundaries on the potentially endless number of matters that fall within [its] terms, including "risk factors," "situational factors," "indicators," and "contraindicators." At this time, plaintiffs cannot be certain they have evaluated and counseled their patients as required by the Act and face the constant possibility of prosecution.

(LF at 27-28.)

Although the infinite scope of the Act's language renders it impermissibly vague for that reason alone, both the legislative evolution of Missouri's informed consent requirements and the sworn statements of the Attorney General's expert witness, Dr. Ferris, reinforce the conclusion that the Act's requirements are

unconstitutional. First, the predecessor "informed consent" provisions of the Missouri Revised Statutes, which this Act repealed, more clearly defined the scope of the physician's obligations. The prior law required the physician to inform the patient of "[t]he particular risks associated with the abortion technique to be used" and further provided that "the physician may inform the woman of any other material facts or opinions, or provide any explanation of the above information which, in the exercise of his best medical judgment, is reasonably necessary to allow the woman to give her informed consent" Mo. Rev. Stat. § 188.039 (repealed 2003) (emphasis added) (LF at 12-13).

The Act, by contrast, contains no such limiting language—that is, unlike the prior statute, it is neither restricted to the giving of "particular," "material," or "reasonably necessary" information, nor does it allow the physician to exercise his or her "best medical judgment." Instead, the Act appears to require physicians to discuss all "indicators," "contraindicators," and "risk factors" including, but not limited to, "any physical, psychological, or situational factors." Mo. Rev. Stat. §§ 188.039.2 and 188.039.3. "When the legislature has altered an existing statute, such change is deemed to have an intended effect, and the legislature will not be charged with having done a meaningless act." See State ex rel. Dir. of Revenue v. Gaertner, 32 S.W.3d 564, 567 (Mo. 2000) (en banc) (quotation marks and citations omitted); see also Hillyard v. Hutter Oil Co., 978 S.W.2d 75, 79 (Mo. Ct. App. 1998) ("We presume the legislature knew the law when it enacted [the statute] and intended to effect some change in the existing law."). Thus, given a

prior statute that imposed more clearly defined boundaries and allowed physicians to exercise their professional judgment, the Act must be read to require physicians to disclose remote, non-material, and unnecessary information—which may or may not be in their best medical judgment—to their patients.⁴

Second, in the federal proceedings, Dr. Ferris confirmed that, under the Act, physicians could be required to discuss an endless number of matters with their patients. For example, Dr. Ferris testified that the term "situational factors"

⁴ Indeed, the record makes clear that the legislature's purpose in passing the Act was to expand physicians' "informed consent" obligations so as to increase lawsuits against abortion providers for failure to disclose to the patient all the information required by statute. In particular, some of the most troubling language in the Act is taken from "model" legislation promoted by an organization whose stated purpose is to "end abortion." (LF at 385 n.10, 322 n.4, 176-77, 239, 254.) The "model" legislation is described as a way to "make it easier for women to hold abortionists liable for failing to screen." (*Id.* at 385 n.10, 322 n.4, 177, 254) Moreover, much of the declaration submitted in opposition to Planned Parenthood's Motion for Preliminary Injunction in the federal action by the Attorney General's expert witness, Dr. Robert Ferris, was copied from an article, posted on that organization's website, that advocates more stringent evaluation and informed consent requirements as a way to curtail abortions and increase the malpractice liability of "abortionists." (*Id.*)

encompasses every facet of life, without any limitation: "Situational factors are social factors, domestic factors, cultural factors, financial factors, et cetera. There is a lot more It is all environmental sort of factors so to speak." (LF at 436 (emphasis added).⁵) He added: "[T]here [are] hundreds of things you can ask" to determine a patient's "social situation." (Id. at 435.) Moreover, Dr. Ferris explained that reasonable physicians could disagree as to whether something is a "risk factor," an "indicator," and a "contraindicator." (*Id.* at 439.) Assuming Dr. Ferris meant what he said, it would be impossible for a physician to be sure that he or she has fully explored and discussed with the patient all matters required by the Act. This sort of amorphous requirement—without boundary or clear definition is precisely the type of statute that the due process clause prohibits. Planned Parenthood's Medical Director, Dr. Marvin Camel, explained at his deposition in the federal proceedings, "when you don't know how far it goes, you don't understand it." (LF at 402.)

Dr. Ferris further acknowledged the Act's unduly broad requirements by repeatedly opining that any ambiguity in the Act would be cured by what he thought would be a "checklist" that would be prepared by the Missouri Department of Health and Senior Services and that would enumerate the specific matters falling within the Act's requirements. For example, when asked at his deposition whether a "reasonable doctor could disagree as to whether something is

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⁵ The full transcript of the deposition of Dr. Ferris's is reprinted at LF 183-207.

a risk factor or whether something is an indicator or contraindicator," Dr. Ferris stated, "Of course. But all he has to do is follow the list." (LF at 439.) He added:

You can call it a check list or areas to go over with the patient.

Whatever you want to call it, it will be a guideline or check list, whatever you want to call it, so the physician can stand in conformity of Bill 156 [now the Act] and the patient will have all the relevant information at her fingertips through the questions of the doctor"

(*Id.* (emphasis added).) Similarly, in the federal action, the Attorney General argued that a form supposedly to be promulgated by the state agency "could clarify any perceived ambiguity, assure uniform application of the new statute's terms, and circumvent the need for this Court to decide a constitutional issue."
(*Id.* at 276.) However, the Act only requires that the state agency prepare "a model form" for the patient to sign; it does not require the agency to promulgate a "checklist" of the indicators, contraindicators, and risk factors, to be discussed with the patient. Moreover, such a form has not been promulgated, and the Act is clear that its requirements and criminal penalties are in force even if the agency never issues a form. Mo. Rev. Stat. § 188.039.5 ("any lack of unavailability of such a model form shall not affect the duties of the physician"). Finally, if the Act's requirements were clear, there would be no need for the agency to promulgate such a form.

B. The Scienter Provisions Do Not Cure The Act's Vagueness.

The trial court found that a "knowing violation of Section 188.039 RSMO is required to subject an individual to criminal prosecution and/or license revocation pursuant to Sections 188.075 and 188.065 RSMO." (LF at 487.) The "knowledge" requirement contained in Sections 188.075 and 188.065 do not, however, cure the Act's vagueness; indeed, the trial court failed to offer any explanation of how a "knowing" requirement in any way clarifies or limits physicians' obligations under the Act.

The United States Supreme Court has made clear that a scienter provision is not a cure-all for vagueness. In *Smith v. Goguen*, for example, the Court struck down as vague a statute that subjected anyone who "treats contemptuously" the American flag to criminal liability, even though the state court interpreting the statute had restricted the statute's scope to "intentional" contempt: "[T]his holding still does not clarify what conduct constitutes contempt, whether intentional or inadvertent." 415 U.S. 566, 580 (1974). Similarly, in *Baggett*, the Court held that reading "knowledge . . . into every provision" did not make clear "what is it that the [plaintiff] must 'know'" and, therefore, did not cure the vagueness of a statute that prohibited "subversive" individuals from certain employment. 377 U.S. at 369.

Moreover, courts have routinely struck down laws regulating abortion on vagueness grounds, even in the presence of a scienter requirement. *See Planned Parenthood of Idaho v. Wasden*, 376 F.3d 908, 933 (9th Cir. 2004) ("A scienter

requirement of knowledge as applied to an unknowable element cannot save a provision from constitutional invalidity."); *Richmond Med. Ctr. for Women v. Gilmore*, 55 F. Supp. 2d 441, 499 (E.D. Va. 1999) ("All three [scienter requirements] modify otherwise vague terms in the Act, and they do not render the Act's vague language any more certain. Thus the scienter requirements fail to provide physicians subject to the Act's criminal penalties with any more notice of what is forbidden."). *Cf. Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 655 F.2d 848, 860 (8th Cir. 1981) ("[T]he presence of a scienter requirement will not entirely eliminate problems caused by vagueness."), *rev'd in part on other grounds*, 462 U.S. 576 (1983).

The scienter provisions at issue here similarly do not resolve the Act's vagueness. A "knowing" requirement does not clarify how far physicians must go to comply with the Act or to what extent they can, if at all, exercise their medical judgment under the Act. For example, if physicians know that a particular matter is, or could be, a risk factor for some women, are they subject to prosecution for failing to discuss that risk factor with a patient if the failure is based on a goodfaith medical judgment that the risk factor is remote or irrelevant for the particular patient? Or what if the physician knows that some physicians believe that something is a risk factor for some women, but he or she disagrees with that assessment? Can he or she be held liable for failing to disclose that factor?

As the scienter provisions do not, and cannot, resolve these questions, this

Court should declare that the Act is unconstitutionally vague under the Missouri

Constitution. If this Court finds that the scienter provisions do resolve these questions, for the benefit of the federal district court, to which the parties must return, this Court should explain how the scienter provisions resolve these questions.

II. The Trial Court Erred In Finding That "The Twenty-Four Hour Waiting Period To Obtain An Abortion Does Not Violate The Missouri [Constitution]" Because The Act's Mandatory Waiting Period Is Unconstitutional Under The Missouri Constitution, In That The Guarantees Of Liberty And Privacy Under The Missouri Constitution Afford More Protection To The Right To Choose An Abortion Than The United States Constitution, And, Under Those Heightened Guarantees, The Waiting Period Must Be Struck Down

Even if the Act is not unconstitutionally vague, this Court should declare that the 24-hour waiting period imposed by the Act violates the rights of liberty and privacy protected by the Missouri Constitution.

In the trial court, the Attorney General argued, and apparently the trial court agreed, that the waiting period requirement should be upheld in light of the decision in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) and its progeny. (LF at 62-63, 166-70.) However, that case was decided under the federal, not the Missouri, constitution, and it is clear that decisions interpreting the federal constitution do not determine the meaning of the Missouri Constitution. *See, e.g., Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81

(1980) ("Our reasoning [does not] limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."); *State v. Rushing*, 935 S.W.2d 30, 34 (Mo. 1996) (en banc) ("Provisions of our state constitution may be construed to provide more expansive protections than comparable federal constitutional provisions."); *see also State v. Brown*, 708 S.W.2d 140, 147 & n.1 (Mo. 1986) (Welliver, J., concurring in part and dissenting in part) (noting a "reemergence of state constitutional law" and state courts' recognition that the "federal constitution only provides the minimum level of protection, leaving state courts free to interpret their own state constitutions to provide greater protection to individual liberty").

This is especially true given the significant textual and structural differences between the Missouri Constitution and its federal counterpart. *See Commonwealth v. Wasson*, 842 S.W.2d 487, 492 (Ky. 1992) ("[T]here are both textual and structural differences between the United States Bill of Rights and our own, which suggest a different conclusion from that reached by the United States Supreme Court is more appropriate."); *Right to Choose v. Byrne*, 450 A.2d 925, 932 (N.J. 1982) ("Where provisions of the federal and state Constitutions differ ... we must determine whether a more expansive grant of rights is mandated by our state Constitution."). Thus, in considering whether the Act violates the Missouri Constitution, this Court is not bound by decisions, such as *Casey*, that construe the federal constitution.

A. The Guarantee Of Liberty Under The Missouri Constitution

Affords More Protection To The Right To Choose An Abortion

Than Afforded By The Federal Constitution.

The Missouri Constitution's far-reaching right to liberty affords more protection to the right to choose an abortion than afforded by the United States Constitution. Significantly, the United States Constitution mentions liberty only in the context of due process: "[N]or shall any State de prive any person of life, liberty, or property, without due process of law" U.S. Const. amend. XIV, § 1. The Missouri Constitution, by contrast, contains both a due process clause and confers an additional, sweeping grant of liberty:

That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design.

Mo. Const. art. I, § 2. Thus, unlike the federal constitution, Article I, Section 2 of the Missouri Constitution provides that every person has a "natural right" to "life,"

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⁶ Missouri's due process clause provides: "That no person shall be deprived of life, liberty or property without due process of law." Mo. Const. art. I, § 10.

"liberty," and "the pursuit of happiness," and that the "principal office" and "chief design" of government is to secure and protect those rights. As this Court long ago held, "[T]he right to liberty and pursuit of happiness . . . recognizes that the individual does not exist solely for the state or society but has inalienable rights which cannot be lawfully taken from him, so long as he behaves properly." Barber v. Time, Inc., 159 S.W.2d 291, 294 (Mo. 1942). Because such "inalienable rights" do not exist in the federal constitution, the Missouri Constitution confers greater liberty rights than are conferred by the United States Constitution. See Strahler v. St. Luke's Hosp., 706 S.W.2d 7, 9 (Mo. 1986) (en banc) (affirming that Missouri Constitution affords right of access to courts beyond that provided in federal constitution; "our state Constitution is . . . a reservoir of personal rights and liberties—some of which are not enumerated in or accorded protection by our federal Constitution"); Paster v. Tussey, 512 S.W.2d 97, 101-02 (Mo. 1974) (en banc) (holding Missouri Constitution affords greater protection than afforded by federal constitution because "the provisions of the Missouri Constitution declaring that there shall be a separation of church and state are not only more explicit but more restrictive than the Establishment Clause of the United State Constitution").

Indeed, the notion of liberty is so strongly rooted in the Missouri

Constitution that—unlike the federal constitution—it vests "all political power" in the people, Mo. Const. art. I, § 1, and gives them "the inherent, sole and exclusive right to regulate the internal government and police thereof, and to alter and abolish their constitution and form of government whenever they may deem it

necessary to their safety and happiness," *id.*, art. I, § 3. Recently, the Tennessee Supreme Court, in concluding that the Tennessee Constitution affords broader protection to the right to choose abortion than the United States Constitution, found that substantially similar provisions in the Tennessee Declaration of Rights exemplify the "strong and unique concept of liberty embodied in [the Tennessee] constitution." *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 14 (Tenn. 2000) ("There is no better statement of our constitution's concept of liberty than [the] audacious empowerment of Tennesseans to forcibly dissolve the very government established but one Article later in our constitution."); *see also Davis v. Davis*, 842 S.W.2d 588, 599 (Tenn. 1992) (noting that individual liberty is "so deeply embedded" in the Tennessee Constitution that it "gives the people, in the face of governmental oppression and interference with liberty, the right to resist that oppression even to the extent of overthrowing the government").

Moreover, although the Missouri Constitution's due process clause is similar in language to the Fourteenth Amendment of the federal constitution, this Court has construed Missouri's due process clause to be more protective than its federal counterpart. *See State ex rel. J.D.S. v. Edwards*, 574 S.W.2d 405 (Mo. 1978) (en banc). In *Edwards*, an unwed father sought to prevent a juvenile court from transferring the guardianship and custody of his son to the state division of family services after terminating only the mother's parental rights. This Court held that the Missouri Constitution Article I, Sections 2 and 10 require the application of a different standard for determining a father's parental rights than set

forth by the United States Supreme Court. Applying this standard, this Court found that the Missouri Constitution affords more protection of parental rights than the father would have received under the federal equal protection and due process clauses. *See* 574 S.W.2d at 409. This Court reached this conclusion in order not "to so dilute these important rights." *Id.* This precise reasoning of *Edwards* applies with equal force here, and this Court is not bound by federal case law in interpreting the scope of Missouri's enhanced liberty guarantees.

The broader and more deeply-rooted expression of liberty in the Missouri Constitution gives rise to greater protection for individual liberty—including a woman's decision to terminate her pregnancy—than that afforded by the United States Constitution. Accordingly, the Missouri Constitution is more protective of the right to choose than the United States Constitution. *See Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620, 629-31 (N.J. 2000) (relying on "expansive" state constitutional provision guaranteeing right to life, liberty, and happiness to afford more protection to right to choose abortion than afforded by federal constitution); *Byrne*, 450 A.2d at 933-36 (same); *Women's Health Ctr. of W.Va., Inc. v. Panepinto*, 446 S.E.2d 658, 664 (W. Va. 1993) (holding "enhanced [liberty] guarantees . . . by our state constitution" create more protection of women's right to terminate pregnancy); *Doe v. Maher*, 515 A.2d 134, 148 (Conn. Super. Ct. 1986) (holding extensive grant of liberty in state constitution gives rise

to greater protection for reproductive freedom than that provided under federal law). 7

B. The Guarantee Of Privacy Under The Missouri Constitution

Affords More Protection To The Right To Choose An Abortion

Than Afforded By The Federal Constitution.

In addition, the Missouri Constitution provides a fundamental right of privacy that affords heightened protection to a woman's right to terminate her pregnancy. In *Barber*, this Court stated that "the right of privacy . . . is, or at least grows out of, a constitutional right." 159 S.W.2d at 294. Nevertheless, "the

⁷ The state courts in some of the cases cited in the text construed the enhanced liberty guarantees in their state constitutions as encompassing a right to privacy, a conclusion that, for reasons discussed *infra* Part II.B, should obtain with respect to the Missouri Constitution. This Court, however, need not find that the Missouri Constitution includes a right to privacy in order to conclude that the waiting period violates the Missouri Constitution's fundamental right to liberty. The broad scope of liberty in the Missouri Constitution, even read alone, contains more protection for the right to choose than that afforded by the United States Constitution and renders the waiting period unconstitutional.

⁸ *Barber*, however, involved protection against the disclosure of personal matters, and thus far, its applicability has not been extended to cases involving decisions of personal autonomy. *See Cruzan v. Harmon*, 760 S.W.2d 408, 417 (Mo. 1988).

The court in *Cruzan*, relying entirely on *State v. Walsh*, 713 S.W.2d 508, 513 (Mo. 1986), found "no unfettered right of privacy under our constitution that would support the right of a person to refuse medical treatment in every circumstance." In *Walsh*, however, the court did not foreclose the issue of whether the Missouri Constitution recognizes a right to personal privacy; instead, it merely declined to decide the case on the basis that the parties did not "address[] the distinct nature of Missouri's right of privacy apart from federal doctrines." *Id.* In fact, the author of the decision, Justice Donnelly, filed a separate opinion "expressly reserv[ing] this question for another day." *Id.* at 514-15. He stated:

Section 4 of Article 2 of the Constitution of 1875 asserted "that all persons have a natural right to life [and] liberty"

In 1942, in *Barber v. Time, Inc.*, 348 Mo. 1199, 1205, 159 S.W.2d 291, 294 (1942), this Court found in Section 4, *supra*, a constitutional right to be let alone.

In the Constitution of 1945, the people asserted again "that all persons have a natural right to life [and] liberty" Mo. Const. art I, § 2.

In this circumstance, [federal case law] may or may not, be considered persuasive when this Court is confronted with the question whether, under *our* Constitution, the General Assembly

status of the notion of a constitutional right of privacy still remains largely undefined." *No. Kansas City Hosp. Bd. of Trs. v. St. Luke's Northland Hosp.*, 984 S.W.2d 113, 121 (Mo. Ct. App. 1998) (citations and quotation marks omitted).

The Missouri Constitution should be read to include a fundamental right to privacy encompassing the right to choose an abortion. As described in detail above, Missouri's constitutional guarantee of liberty is expressed in similarly broad language to the constitutions of states in which liberty clauses have been read to include a right of privacy, including the right to choose. See Farmer, 762 A.2d at 629-31 (holding that "expansive" state constitutional liberty provision "incorporates within its terms the right of privacy and its concomitant rights, including a woman's right to make certain fundamental choices"); Byrne, 450 A.2d at 933 ("By declaring the right to life, liberty, and the pursuit of safety and happiness, [the provision] protects the right of privacy, a right that was implicit in the 1844 Constitution."); Maher, 515 A.2d at 148-50 (in construing the state constitution's broad recognition of liberty, court reasoned that the framers of the constitution intended that "the right of privacy is . . . implicitly guaranteed under our state charter of liberty"); Clinic for Women v. Brizzi, 814 N.E.2d 1042, 1049-50 (Ind. Ct. App. 2004) (stating that "the right of personal privacy" is "a necessary

may make private consensual conduct a crime.

Id.

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correlate of the guarantees of life, liberty, and the pursuit of happiness explicitly protected by [the state constitution]").

The right to privacy can also be seen in several other sections of the Missouri Bill of Rights. For instance, provisions in Section 5 guarantee the freedom of worship by preventing any "human authority [from] control[ling] or interfer[ing] with the rights of conscience." Section 8 guarantees the freedom of speech and press. Section 15 explicitly affirms the right of the people to be "secure in their persons, papers, homes and effects, from unreasonable searches and seizures." Section 24 prohibits the quartering of soldiers "in any house" in time of peace within the consent of the owner. Many provisions similar to these have been held to create a right of privacy under both the federal constitution, see Griswold v. Connecticut, 381 U.S. 479 (1965) (finding law prohibiting use of contraceptives to violate right of marital privacy), and numerous state constitutions, see, e.g., Davis, 842 S.W.2d at 600 (identifying right of procreation as vital part of individual's right to privacy); Women of Minn. v. Gomez, 542 N.W.2d 17, 26-27 & n.10 (Minn. 1995) (holding right of privacy encompasses a woman's right to choose an abortion); *Brizzi*, 814 N.E.2d at 1047 (same).

Moreover, the right to privacy under the Missouri Constitution is more sweeping than the similar right guaranteed by the United States Constitution. Indeed, the above-mentioned provisions of the Missouri Constitution from which the right to privacy emanates—including Article 1, Section 1 ("all political power" vested in the people), Section 2 (natural right to life, liberty and pursuit of

happiness), Section 3 (government controlled by the people), Section 5 (freedom to worship), Section 8 (freedom of speech), and Section 10 (due process)—are more explicit and broader than the correlate rights in the federal constitution. For instance, as explained in detail above, the grant of liberty rights in Missouri's Bill of Rights is both broader and more deeply-rooted than the due process clause of the federal constitution. The right to life, liberty and the pursuit of happiness is expressed not only in Missouri's due process clause, *see* Mo. Const. art. 1, §10, but also as a "natural right" of all persons, *see id.* art. 1, § 2. In addition, the broad grant of power in the Missouri Bill of Rights to citizens to regulate their own government is not found in the federal constitution. *See id.* art. 1, §§ 1, 3.

Similarly, Missouri's Constitution expresses the right to worship as a "natural and indefeasible right" of all persons. *Id.* art. 1, § 5. That section also provides "that no human authority can control or interfere with the rights of conscience; that no person shall, on account of his religious persuasion or belief, be rendered ineligible to any public office or trust or profit in this state, be disqualified from testifying or serving as a juror, or be molested in his person or estate" *Id.* In contrast, as the Tennessee Supreme Court has noted, "the explicit guarantee of freedom of worship found under the United States

Constitution occupies but sixteen words in an amendment generally guaranteeing freedom of worship, freedom of speech, freedom of the press, the right to assemble, and the right to petition the government for redress of grievances."

Sundquist, 38 S.W.3d at 13 (citation omitted). Likewise, Section 8 of the Missouri

Constitution confers a sweeping grant of free speech rights: "That no law shall be passed impairing the freedom of speech, no matter by what means communicated: that every person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject, being responsible for all abuses of that liberty" Mo. Const. art. 1, § 8. Again, the federal constitution does not include such an extensive statement of these rights.

Because the provisions from which privacy emanates are more broadly and explicitly stated, the guarantee of privacy under the Missouri Constitution protects the right to choose beyond the protections of the federal constitution. Indeed, relying on these very differences between the Tennessee Constitution and its federal counterpart, the Tennessee Supreme Court held that the right to privacy under the Tennessee Constitution includes a woman's fundamental right to terminate her pregnancy. *Sundquist*, 38 S.W at 12-16.⁹ This reasoning applies in equal measure here.

⁹ Many other states have interpreted the right to privacy in their constitutions to protect the right to choose an abortion more extensively than does the federal constitution. *See*, *e.g.*, *Farmer*, 762 A.2d at 629; *Valley Hosp. Ass'n, Inc. v. Mat-Su Coalition for Choice*, 948 P.2d 963, 969 (Alaska 1997); *Gomez*, 542 N.W.2d at 31; *Byrne*, 450 A.2d at 305; *Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779, 784 (Cal. 1981); *Maher*, 515 A.2d at 426.

C. Under The Heightened Guarantees Of Liberty And Privacy In
The Missouri Constitution, The 24-Hour Waiting Period Must
Be Struck Down.

This Court should hold that Missouri's constitutional guarantees of liberty and privacy afford more protection to the right to choose than the federal constitution; that the right to choose abortion is protected by these constitutional guarantees; and that restrictions on access to abortion, such as the Act's waiting period must be subjected to strict scrutiny, and upheld only if "necessary to accomplish a compelling state interest." In re Marriage of Woodson, 92 S.W.3d 780, 784 (Mo. 2003); see also Witte v. Dir. of Revenue, 829 S.W.2d 436, 439 n.2 (Mo. 1992) (en banc) ("Cases involving . . . 'fundamental interests' force the courts to peel away the protective presumption of constitutionality and adopt an attitude of active and critical analysis, thus subjecting the classification to strict scrutiny." (quotation marks and citation omitted)); Labor's Educ. & Political Club *Indep. v. Danforth*, 561 S.W.2d 339, 347-48 (Mo. 1977) (en banc) (applying strict scrutiny to fundamental right to seek public office and holding that statutory provision denying the right to run for public office based on the particular office sought was unconstitutional under both the United States Constitution and the Missouri Constitution). 10

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¹⁰ Even if strict scrutiny is not warranted, the Court must apply greater scrutiny than the "undue burden" standard because the Missouri Constitution affords more

The burden of demonstrating that the waiting period requirement is necessary to further a compelling state interest rests on the Attorney General. See Witte, 829 S.W.2d at 439 n.2 ("The effect [of a classification scheme that affects fundamental rights] is to shift the burden of proof to justify the classification from the individual attacking such classification to the State or its agencies." (quotation marks and citation omitted)).

A number of state and federal courts applying strict scrutiny have struck down waiting period requirements as unconstitutional. See, e.g., Sundquist, 38 S.W.3d at 22-24 (state failed to carry its burden to show that the waiting period requirement "is narrowly tailored to further its compelling interest in maternal health"); Planned Parenthood of Missoula v. State, No. BDV 95-722, slip op. at 6-9 (Mt. Dt. Ct. Mar. 12, 1999) (LF at 299-302) ("[S]ince the waiting period infringes on a woman's right to exercise a fundamental constitutional right and is not supported by a compelling reason, it is in violation of Montana's [constitution]."); Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 427, 449-51 (1983) (state failed to demonstrate that any compelling state interest is

protection to the right to choose than its federal counterpart. The Attorney

General utterly failed to demonstrate below that summary judgment is warranted under such heightened scrutiny.

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furthered by "an arbitrary and inflexible waiting period."), *overruled on other* grounds by Casey, 505 U.S. 833 (1992).¹¹

The waiting period at issue here similarly fails to pass constitutional muster. The Attorney General did not meet his burden of proving—indeed, he did not even argue—that the waiting period requirement is necessary to further a compelling state interest. Accordingly, this Court should declare that the Act's waiting period requirement violates the Missouri Constitution.

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<sup>See also Zbaraz v. Hartigan, 763 F.2d 1532, 1537-38 (7th Cir. 1985); Planned
Parenthood League of Mass. v. Bellotti, 641 F.2d 1006, 1014 (1st Cir. 1981);
Charles v. Carey, 627 F.2d 772, 785-86 (7th Cir. 1980); Women's Med. Ctr. of
Providence, Inc. v. Roberts, 530 F. Supp. 1136, 1146-47 (D.R.I. 1982); Margaret
S. v. Edwards, 488 F. Supp. 181, 213 (E.D. La. 1980).</sup>

CONCLUSION

The Court should reverse the decision of the court below and remand for further proceedings.

Dated: July 25, 2005 Respectfully submitted,

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